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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1086

ALBERT MASCOLO and LOUIS EPIFANIA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1973
No.

ALBERT MASCOLO and LOUIS EPIFANIA,

Petitioners,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners Albert Mascolo and Louis Epifania, interested jointly herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit dated November 14, 1973, affirming the judgment of conviction dated June 8, 1973, rendered in the Eastern District of New York, and an order of the District Court dated August 14, 1973 denying petitioners' application to vacate the jury verdict and to dismiss the indictment in the interests of justice.

OPINIONS BELOW

The unreported memorandum decision of the Court of Appeals, ——F2d——, is set forth in Appendix A of this Petition (A1-A2).

The unreported opinion of the District Court (Bartels, J.) — — F.Supp. ——, is set forth in Appendix B of this petition. (A3-8).

JURISDICTION

The judgment of the Court of Appeals was entered on November 14, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

On December 6, 1973, the Court granted petitioners' application to extend the time within which to petition for certiorari to January 13, 1974.

QUESTIONS PRESENTED

1. Were the petitioners prejudiced in their constitutional rights to procedural and substantive due process where it is conclusively established at the trial that the prosecution (a) had falsely and fraudulently withheld from the court and defense counsel the disclosure of the existence and the identity of a key informant and co-conspirator throughout the entire search and seizure suppression hearing, and that such informant's information to the government agents was vital to the central issues relating to the legality of a warrantless arrest and to the absence of search warrants; (b) had falsely alleged in the indictment, the government's bill of particulars and in the discovery proceedings that there were no other co-conspirators;

and (c) had, throughout the trial, frustrated and thwarted effective cross-examination and impeachment of the government's principal witnesses concerning their relationship with said informant, particularly in regard to these petitioners?

2. Did the Court of Appeals commit constitutional error in holding—contrary to the fixed standards laid down by the Supreme Court governing warrantless arrests and searches under the Fourth Amendment, and in conflict with the decisions of other federal courts of appeal including its own precedential decision in *Coplon v. United States*, 185 F. 2d 629, 635-6—that no arrest warrant is required for any street-auto arrest, even if the Government had ample time to seek a warrant?

3. Is a warrantless street-auto arrest, contrived under the false colors of pretended exigent circumstances and lack of pre-existing probable cause, an inherently unreasonable search and seizure violative of the Fourth Amendment?

4. Did the denial of petitioners' motion to vacate the jury verdict and sentence by the District Court, without a hearing, and its failure on application, or *sua sponte*, to re-consider *de novo* the issues raised in the suppression hearing, in the light of the diametrically contradictory evidence adduced at the trial, deprive the petitioners of their procedural and substantive rights of due process under the Fourth and Fifth Amendments?

5. On the Government's own standard of proof elicited at the suppression hearing, did the prosecution fail to meet the burden of proof in either of the two warrantless arrests depicted in this case under the Fourth Amendment?

6. Did the primary illegality of the September 28, 1972 arrest

of the co-conspirator Wieder fatally taint all evidence derived therefrom as the "fruit of the poisoned tree?"

7. Did the prejudicial introduction into evidence, in the main case of the prosecution, of an alleged prior narcotic sale antedating the conspiracy charged in the indictment, especially where proof of guilt had not been otherwise established, violate the due process rights of the petitioners?

8. Was the guilt of the petitioners established beyond a reasonable doubt, as a matter of law?

9. Is Title 18 USC Sec. 3511, authorizing the interception of a telephone conversation, where only "one of the parties" has given prior consent, unconstitutionally derogative of the right of privacy of all the other parties to the conversation, under the Fourth and Fifth Amendments, in view of *Katz v. United States,* 389 U.S. 487?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment

"No person *** shall be *** deprived of life, liberty, or property, without due process of law ***".

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him *** and to have the Assistance of Counsel for his defense."

Statutes

Title 18 U.S. Code Sec. 2511 (2) (c):

"It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or one of the parties to the communication has given prior consent to such communication."

STATEMENT OF THE CASE

The Gross Prosecutorial Misconduct

Though the government had full knowledge of the complicity of one John McMillan as a co-conspirator and cooperative key informant since June 2, 1972, the date of his arrest, and had fully availed itself of the information he had furnished to effect the arrest of the co-conspirator Dennis Wieder on September 28, 1972, and of the petitioner Mascolo on October 25, 1972, the prosecution nevertheless wrongfully withheld all disclosure of the existence of said McMillan throughout the entire suppression hearing to contest the legality of the arrest and the seizure of evidence.

At the trial in the same pattern of prosecutorial misconduct, the government effectively precluded the defense from cross-examining and impeaching the principal prosecution witnesses, Special Agent Sears and the co-conspirator Wieder, vis a vis the information allegedly imparted to them by McMillan concerning these petitioners.

Again, the indictment filed herein on November 13, 1972 falsely and fraudulently alleged that the petitioners and Wieder, as co-conspirators, had acted with "conspirators unknown", willfully omitting the known conspirator McMillan.

In complete disregard of the Court's order granting a Bill of Particulars setting forth "the names of all co-conspirators, presently known to the Government, although not set forth in the indictment, and their addresses at the time of their participation in the conspiracy", the Government's Bill of Particulars, dated January 5, 1973, falsely responded thereto as follows: "Only those mentioned in the indictment: Louis Epifania, Albert Mascolo, Dennis Wieder."

Still again, the prosecutor deliberately flouted the Court's specific directions for Discovery and Inspection for the production of all statements "of any conspirator, co-conspirator or co-defendant which tend to incriminate the defendant Louis Epifania and which the Government intends to use at a trial as statements made during the course of or in furtherance of the alleged conspiracy". (478-487).,

Though McMillan's statement implicating the petitioner was in the actual possession of Agent Sears—the same officer who had arrested Wieder as well as Mascolo on September 28th and October 25, 1972, respectively, purposely deleted from the 3500 material was any reference to McMillan (479-482, Def. Ex. B);

*Numerals refer to page numbers of trial record.

further, Agent Sears admitted at the trial that he did not turn over his report of the McMillan statement taken June 1972 among the 3500 material to defense counsel (1607-12).

By letter dated February 1, 1973, ten days before the commencement of the trial, the prosecution for the very first time notified the trial court, and defense counsel, that John McMillan, 18-35 Corporal Kennedy Boulevard, Bayside, Queens, New York was the "unknown" conspirator alleged in the indictment, and again falsely represented that "information linking John McMillan as a co-conspirator was obtained by the Government on January 30, 1973, and was not verified until 7:00 P.M. January 31, 1973."*

Finally, the prosecutorial misconduct at bar frustrated and thwarted the Petitioners' rights to a fair suppression hearing under the Fourth Amendment and Rule 41(e) Federal Rules of Criminal Procedure.

Vividly illustrative of the prosecutor's ploy regarding McMillan was the following false representation to the Court, and to defense counsel, depicted in the record, at the very outset:

> THE COURT: Is he or is he not a Government agent?
> MR. DEL GROSSO: He is not and he has never acted as such.
> MR. ROSEMAN: We will accept that representation.
> MR. DEL GROSSO: In this case. (6-7).

Again, at the very conclusion of the hearing, when the Court pointedly inquired of the prosecution why, *"if there was to be,*

*This letter to the Court was signed by Robert G. Del Grosso, Special Attorney, Dept. of Justice, who had been newly assigned to try this case as of that date.

according to Wieder, another delivery of narcotics on October 25th, why didn't you get a warrant? (130) the prosecutor fraudulently represented to the Court that there was "no other evidence" linking Wieder to the Petitioners (131) and deliberately secreted from the Court the vital evidence it had from the key informant McMillan sufficient to establish probable cause for the issuance of an arrest or search warrant.

The Suppression Hearing

Again, at the suppression hearing, the prosecution elicited from Agent Sears, on re-direct examination, that he had no corroborating information dealing with the petitioners, other than Wieder's telephone call to Epifania; and further, that he had no knowledge of "any arrests, or indictments or convictions resulting before this," from which he could receive such corroborating information (123). As a matter of fact, however, Agent Sears had himself arrested McMillan on June 2, 1972, who was actually under indictment at the very time of the perjurious testimony so given by him at the suppression hearing (1362).

Dennis Wieder testified that on October 25, 1972, at 1:00 or 1:30 P.M., he phoned Epifania from the Westbury office of the Bureau of Narcotics and Dangerous Drugs, at the request of Agent Sears, the arresting officer (321). The phone conversation, 20 or 30 seconds in duration, was recorded by Agent Sears with Wieder's consent (21-23, 27-28, 41). In that telephone conversation, Wieder informed Epifania that their scheduled meeting for 2:00 P.M. on that day was to be re-scheduled for 4:00 P.M. at the same location, and that he would pick the "shirts" up at that time instead (29-32).

Special Agent Robert K. Sears, Bureau of Narcotics and

Dangerous Drugs, testified that he had arrested Wieder on September 28, 1972, after pursuing him in a vehicle while the latter was "avoiding an arrest". (53). The arrest was based on information received "from an informant", who had observed Wieder in possession of a quarter kilogram of heroin (57-59).

Asked by the Court whether the unidentified informant was "reliable", Special Agent Sears stated that he "was registered with the Bureau of Narcotics and Dangerous Drugs", and that "contact with the New York City Police Department reveals he had given information to them prior to this case." (58).

The initial surveillance of Wieder had begun about a week prior to his arrest, at Corporal Kennedy Boulevard (A-61).

On September 28, 1972, the day of Wieder's arrest, four or five unmarked Government vehicles had staked out the latter's car. When Wieder stopped for a traffic light on Corporal Kennedy Boulevard, one of the Government vehicles proceeded in front of Wieder's car, another positioned itself to the left of the car and two other vehicles were adjacent. When the agents exited from their vehicles, one of them activated his red light and siren. The other agents had their badges and revolvers in their hand. At this point, Wieder attempted to get away. (55, 59-60).

During the chase, he saw Wieder throw out a package from the window on the passenger side of the automobile on Corporal Kennedy Boulevard. It was a brown paper bag containing two plastic bags of white powder (54).

They pursued him for a half mile and then arrested him (62-63).

The Trial

At the trial, but not at the suppression hearing, it was established for the first time that John McMillan, who was Wieder's uncle, had been arrested by Special Agent Sears for possession of heroin on June 2, 1972, shortly following an alleged transaction through Wieder with the petitioners.

Immediately after the arrest, McMillan fully cooperated with the Government as a reliable informer. (411, 1345, 1360-1). He was released on personal bond the following morning (378).

McMillan told Agent Sears about all his alleged transactions with petitioner Epifania "probably the first interview I had with him" (841-2, 1377-9). In fact, he was on a first-name basis with "Bob" Sears and the other agents with whom he had been cooperating (1377). His job was "to inform on other people." (1385).

McMillan had told Agent Sears that he had narcotic dealings with petitioner Epifania as early as March 1971, ante-dating the conspiracy alleged in the Indictment commencing January 1, 1972; that on that occasion, McMillan's nephew, the co-conspirator Dennis Wieder introduced him to Epifania at the latter's luncheonette located as 246 Grand Street, Manhattan "so I (McMillan) can buy his narcotics." (1332): that after agreeing on a price, McMillan called Epifania about a week later, placed an order, but then cancelled it; that, subsequently about a week afterwards, he purchased an 1/8 kilo of heroin for $3400 from Epifania, gave him $2500 in cash and would owe him the balance; that the narcotics turned over to McMillan was in a brown paper bag containing a plastic bag of white powder (1334-7). McMillan paid the balance a few days later, dropping it off at

Epifania's luncheonette at Grand Street (1337-8).

At the trial, but not at the suppression hearing, McMillan testified that it was he who supplied the information to Agent Sears resulting in the arrest of his nephew Wieder, on September 28, 1972 (1094-7, 1364-6); that just prior to that arrest, he had pre-arranged with Agent Sears to meet him about a block away from McMillan's home at Corporal Kennedy Boulevard in Queens; that at that time, he informed the government agent that Wieder was then and there in his apartment, and would be leaving shortly with a quarter kilogram of heroin in his possession, which he had just allegedly purchased from the petitioners (222-4, 1094-7).

In addition, McMillan testified upon the trial that he had engaged in a "joint venture" with Wieder in January 1972 to buy narcotics from petitioner Epifania (1388); that on that occasion, at Cropsey Avenue and Bay 25th Street in Brooklyn, Wieder purchased 1/8 kilo of heroin from petitioners for $2200, which moneys had been given to him by McMillan shortly before (1319-20, 1325-6); that immediately after that transaction, he and Wieder then proceeded to McMillan's house at 1835 Corporal Kennedy Street in Bayside, Queens; that there, they cut the heroin into four ounces; that McMillan kept three ounces and Wieder took one (1324-5).

McMillan further testified, upon the trial, that he had had subsequent dealings with Wieder and petitioner Epifania in May 1972, at which time he had purchased 1/8 kilo of heroin for $2200 "on consignment"; that it was this transaction that had led to his, McMillan's arrest on June 2, 1972 (1390).

At the trial, but not at the suppression hearing, it was con-

clusively established that the September 28th transaction leading to Wieder's arrest on that day was the *ninth* in a series of substantially identical transactions with petitioners at that very same "usual meeting place", at Cropsey Avenue and Bay 25th Street in Brooklyn, located approximately one block from petitioner Epifania's home (180-222, 193). In each of the nine transactions, the meeting would be pre-arranged by a telephone call from Wieder to Epifania; in each of them, one of the two petitioners would enter Wieder's car at that corner with a brown paper bag containing glassine envelopes of heroin (180-222, 1337).

Wieder testified that he purchased a kilo of heroin for $5400 from the Petitioners on September 28, 1972. As before, the transaction took place on the corner of Cropsey Ave. and Bay 25th St. Immediately following that transaction, he proceeded to Long Island to "visit" McMillan at the latter's residence in Corporal Kennedy Drive (221-3).

Shortly after leaving McMillan's home on Corporal Kennedy Drive, at about 6:45 or 7:00 PM, Wiener was surrounded by a group of agents who blocked his car to effect his arrest (55, 57-60). They had had him under surveillance from about 3:30 PM that day. The agents exited their vehicles, with guns and shields in their hands, and identified themselves as federal officers (899). At that moment, Wieder sped away. During the short chase, he threw a brown paper bag out of the car window. Pursuing him for a half mile, they finally took him into custody (900). The paper bag was found to contain glassine envelopes of heroin. Agent Sears asked Wieder to cooperate, stating that "they know who I got it from——he said I got it from Lou" (petitioner Epifania) (517-8, 523).

At the trial, but not at the suppression hearing, it was established that the petitioner Mascolo was arrested on October 25, 1972 by Agent Sears on October 25, 1972 at Cropsey Avenue and Bay 25th Street in Brooklyn, the same Agent who had previously arrested McMillan on June 2 and Wieder on September 28, 1972. This was the *tenth* transaction at that meeting place (183-219, 248-9).

The petitioner Epifania lived only a block away from Cropsey Avenue and Bay 25th St. (274). Further, Agent Sears had admittedly "cased" the area a week prior to the arrest; that he had received information from an unnamed individual, not Wieder, that that corner had been used for narcotics transactions (951). That "individual" was McMillan, who testified he was with Wieder in that very area, on two occasions (1319-20, 1325-6, 1390).

Though a Magistrate was then readily available for the issuance of a warrant, Agent Sears did not apply for an arrest warrant, nor for any search warrant (105-8).

Further, that a day prior to the arrest of Mascolo, October 24, 1972, Wieder had informed Agent Sears that he had set up an appointment with petitioner Epifania to buy narcotics at 1 PM the following day (78, 421). Agent Sears thereupon requested Wieder to report to the Westbury District Office the next morning, October 25th. (844-6). Wieder arrived at 10:15 AM and gave to Agent Sears Epifania's telephone number and license plate number, from which he immediately obtained the latter's full name and address (847-8).

Despite Agent Sears' claim that he didn't know Epifania's name and address until October 25, 1972 as aforestated, the

government's own official report conclusively established, however, that Agent Sears' testimony in this respect was wholly false. The official report of Agent Tierney, contained in the 3500 material turned over to defense counsel, proved that Agent Sears had had information as to Epifania's name and address at least as far back as October 6, 1972 (Def. Ex. J, 1227-1233). That report was as follows:

> "On October the 6th, 1972, a letter was sent by Special Agent Sears requesting toll call information on telephone number 212-996-4066 for a five month period prior to the date of the request. The records reflected that the number is non-published to Louis A. Epifania at 2044 21st Drive, Brooklyn, New York." (1790-91, 1839)

Following that telephone call, the Agents handed to Wieder $6000 in official Government funds. They then proceeded from the Westbury District Office to the corner of Cropsey Ave. and Bay 25th St. in Brooklyn. The pre-arranged signal for the arrest was that after Wieder had completed the transaction on that corner, he was to make a turn at the intersection, and "if he failed to utilize his directionals, that was the signal that heroin was in the car and that we should arrest defendants." (883-6). Under the front seat of Wieder's car on the passenger side, the Agents seized a brown paper bag containing heroin (884-6).

From the Westbury Office, Wieder phoned Epifania at approximately 1:30 PM, at the Agent's request, and changed the appointment to 4:00 PM, at which time he, Wieder, would pick up the "shirts" (426-7, 529). That phone conversation was recorded by Agent Sears, with Wieder's consent (228, 848-50, 852, 855, 1106-11, Govt. Ex. 6).

On cross-examination, Wieder admitted that it was he who

had used the word "shirts", not Epifania; that he had never used the word "shirts" in any prior conversation with him; that he had used the word "things", not "shirts", in his conversation with Epifania on September 28 (219-220); that he had testified before the Grand Jury, on October 30, 1972—only four days later—that the word "shirts" had not been used in the October 25th telephone conversation he had had with Epifania (668); that he had told the Agent on October 26th, the day following Mascolo's arrest, that he had used the words "goods" and "things", rather than "shirts" in all his conversations with Epifania (654).

On re-direct examination following a week-end recess—during which time the prosecutor had actually conferred with Wieder – with the Court's permission – he now flatly contradicted his own testimony, as follows: "I met Louis in January. He told me if I ever had to use the word heroin on the phone to use the word shirt. Agent Sears asked me to call Louis at his home on October 24th. On the 25th, he said if there is any word you use in code, say it on the phone. I used the word shirts." (654).

The motion to vacate the verdict in the interests of justice.

Prior to the imposition of sentence, the petitioners jointly moved the District Court to vacate the jury verdict and to dismiss the indictment in the interests of justice.

The prosecution did not deign to respond to the specific and detailed allegations of prosecutorial misconduct. It elected to file no formal answer thereto. Instead, the Government countermoved to dismiss the proceeding on the grounds that the ap-

plication to vacate the jury verdict was not timely made under the Federal Rules of Criminal Procedure; that neither Petitioner had legal standing to contest the validity of Wieder's arrest on September 28, 1972; that Petitioner Epifania had no legal standing to contest the evidence seized incident to Mascolo's arrest on October 25, 1972; and that the claimed prosecutorial misconduct was "harmless error" in any event.

The Petitioners thereafter interposed a detailed Reply and Answering Affidavit thereto.

Following oral argument, the Court summarily denied the motion to vacate the jury verdict and sentence, without a hearing. The Court's decision appears in the Appendix herein. (A3-8)

The Affirmance of the Judgment by the Court of Appeals

On oral argument, in contradistinction to its Brief, government counsel frankly conceded to the Court of Appeals that the prosecution did make misleading statements to the trial court.

When affirming the judgment of conviction, the court explicitly held:

> "Although the prosecution may not have been as candid as would have been desirable, we are unable to see what prejudice this caused the defendants. The contention that although the Government had probable cause to arrest, it was required to seek a warrant for a street arrest if it had time to do so is without legal basis. The mandate shall issue forthwith." (A-2)

REASONS RELIED ON FOR ALLOWANCE OF WRIT

A. Petitioners were gravely prejudiced by the prosecutorial misconduct at bar, depriving them of their rights to due process under the Fourth, Fifth and Sixth Amendments of the Constitution.

In its specific holding that the petitioners were not prejudiced by the gross prosecutorial misconduct conclusively demonstrated at bar, the Court of Appeals has decided a federal question in direct conflict with the applicable decisions of this Court relating to constitutional rights of due process, and has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. (*Rules of Supreme Court, Rule 19; Smith v. Illinois,* 390 US 129; *Estes v. Texas,* 381 US 532; *Brookhart v. Janis,* 384 US 1; *Alford v. United States,* 282 US 687).

The holding by the Court of Appeals that no prejudice resulted to these petitioners is in direct conflict with the applicable decisions of other courts of appeal, as well as its own prior decisions thereon. (*Flanagan v. Rose, Warden,* 478 F.2d 222 (CA 6, 1973; *United States v. Portomene,* 221 F. 2d 582 (CA 5); *Sorrentino v. United States,* 163 F.2d 627 (CA 9); *United States v. Hanna,* 344 F.2d 327 (CA 6); *United States v. Mele,* 462 F.2d 918 (CA 2); *United States v. Ott,* ——F.2d—— (CA 7, Dec. 5, 1973, 14 CrL 2257-8).

To hold that the petitioners had not been prejudiced in a case so deeply saturated with basic constitutional spoliation is to sanction the denial of a fair trial guaranteed to them by the due process clause, nullify the protection of the Fourth Amendment

against unreasonable search and seizure, and condone prosecutorial misconduct so grave as to undermine the very integrity of the judicial process and the sound administration of criminal justice.

The petitioners' constitutional rights to a fair trial had been gravely prejudiced by the prosecutorial deception vis-a-vis McMillan, in two fundamental respects: *Firstly*, by the systematic suppression of McMillan's involvement as key informant and co-conspirator throughout the trial, the petitioners were effectively prevented from impeaching the credibility of the chief Government witnesses, Special Agent Sears and the co-conspirator Wieder. *Secondly*, the petitioners' rights to a fair hearing implicit in the guaranty against unlawful search and seizure were grossly violated.

By the systematic cover-up of all avenues leading to McMillan, the petitioners were effectively prevented throughout the trial from cross-examining and impeaching the credibility of the government's chief witnesses, Agent Sears and Wieder. Consistent with the prosecution's strategy vis a vis the key informant and co-conspirator McMillan, that witness was not only completely excised throughout the entire suppression hearing, but was specially reserved as the government's very last witness at the trial, thus reducing the opportunity for probing into the credibility of Agent Sears and Wieder to an almost negligible degree.

Whatever evidence was adduced at the trial concerning the intimate tie-up between McMillan and Special Agent Sears and Wieder came out, not from the forthright disclosure in direct examination of these witnesses by the prosecution, but only through the combat of a tortuous and frustrating cross-

examination, arduously achieved against a continuing barrier of objections and adverse rulings by the trial court against the petitioners as to relevance and materiality.

Thus, the petitioners were deprived of a fair opportunity to cross-examine Wieder as to his false testimony upon the trial that he had "borrowed" the purchase money for the heroin from his uncle McMillan in the January 1972 initial transaction charged in the indictment, whereas in truth, as subsequently elicited from McMillan during cross-examination at the trial, he gave the purchase money to Wieder as a "joint venture". (1388).

Again, the petitioners were denied a fair opportunity to impeach the manifestly untruthful testimony of Wieder that shortly before his arrest on September 28, 1972, he had merely "visited" McMillan immediately after purchasing the narcotics (223) — rather than, as subsequently elicited from both Agent Sears and McMillan, had gone to McMillan's home to turn over to him the contraband he had just allegedly purchased from the petitioners.

And still again, the prosecution permitted Wieder to testify before the Grand Jury that just prior to his own arrest on September 28, 1972, he had stopped at his relative's house in Long Island just "to say hello", and permitted Wieder to repeat that misleadingly false testimony on re-direct examination at the trial (431-2, 636-638). The fact is, however, as cross-examination of both Agent Sears and McMillan subsequently revealed, that meeting between Wieder and his relative McMillan was not for the purpose of saying "hello", but was a pre-arranged rendezvous specifically begotten for another illicit narcotics transaction (1368-9). The proof of the pudding was in the fact that Agent Sears and other Agents had been staked out near McMillan's home at that very time, to retrieve the contraband and effect the arrest.

In the same duplicitous pattern, Agent Sears testified at the suppression hearing that he did not know where Wieder was coming from at the time of his arrest, whereas, as Agent Sears and the prosecution well knew, by pre-arrangement with the informant McMillan—Wieder had just come from McMillan's home with the contraband in his possession, with Agent Sears standing by to make the arrest (898, 1367-9).

At the trial, likewise, the prosecution systematically deceived the court and defense counsel regarding McMillan's key role, by vigorous objections thereto throughout (321, 896-7, 951, 1275-6, 1385, 1396-7). Typically, the trial Court explicitly overruled defense objections to the warrantless arrest of petitioner Mascolo on October 25th, 1972, on the ground that the failure to apply for a warrant was "irrelevant" (1101-2). Again, at p. 1369:

> MR. DEL GROSSO: Mr. McMillan's arrest isn't of any relevance here.
> THE COURT: No, I don't understand its relevance at all, Mr. Roseman.

In net effect, had the jury known that Agent Sears had made false and deceptive statements both at the suppression hearing and at the trial, and approvingly acquiesced in the prosecution's false and misleading statements to the trial court, the veracity of both Agent Sears and the co-conspirator Wieder would have been so seriously undermined as to compel an acquittal of these petitioners at the hands of the jury.*

At the suppression hearing, every attempt by the defense to probe into the illegality of the warrantless arrests of Wieder on

*Agent Sears sat at the counsel table throughout the entire suppression hearing (19-20), as well as at the trial.

September 28th and petitioner Mascolo on October 25, 1972, as to McMillan's role therein, was completely frustrated by the prosecution's contrived objections of irrelevancy (56, 66-68), and even of confidentiality—even though the government had already made full disclosure of McMillan in its letter to the Court and defense counsel shortly before the trial (57-59)—thus effectively diverting and preventing the Court from making a proper ruling on the search and seizure issues of probable cause and lack of exigent circumstances (68-69, 321, 556, 1084-1099, 1275-6, 1385, 1396).

Specifically, asked whether the informant who concededly had led to Wieder's arrest was the named co-conspirator McMillan, the District Court sustained the government's objection, and ruled the question "irrelevant". Still again, sustaining the prosecutor's objection, the court foreclosed defense counsel from eliciting from Wieder the critical information whether he was going to make a delivery to McMillan of the contraband found in his possession at the time of his arrest (66-68).

In net effect, by the prosecutorial overreaching at bar, the petitioners had been deprived of their constitutional right of confrontation of the key witnesses against them, guaranteed to them under the Sixth Amendment (*Greene v. McElroy*, 360 US 474; *United States v. Aaron*, 457 F 2d 865 (CA 2, 1972); *Wilson v. United States*, 250 F 2d 312; *United States v. Heath*, 260 F 2d 623 (CA 9, 1958).

In particular, too, the prosecutorial misconduct at bar gravely compromised petitioner Mascolo's right to a severance, denied by the trial Court. For, in concealing McMillan's role as a co-conspirator during all the pre-trial stages of the Indictment, the Government's Bill of Particulars, the Discovery proceedings,

and through the entire Supression Hearing, the defense counsel for Mascolo was precluded from asserting, and the Court was unfairly deprived of an opportunity to assess, the heavy impact of the belated prejudicial testimony relating to (1) McMillan's alleged involvement with Epifania's narcotic dealings as early as March 1971, long ante-dating the conspiracy charged in the indictment commencing January 1972; and (2) Epifania's alleged threat to Wieder after the conspiracy charged against Mascolo had been terminated with the latter's arrest. (277-8)

In *Brookhart v. Janis*, 384 U.S. 1, 3, this Court definitively held that "a denial of cross-examination without waiver . . . would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."

Exactly apropos is *Smith v. Illinois*, 390 U.S. 129, where, in a prosecution charging the unlawful sale of narcotics, the principal prosecution witness, an informer, admitted on cross-examination that the name he had first given was false, but the trial court sustained the prosecutor's objections to questions on cross-examination as to the witness' true name and place of living. In an opinion by Stewart, J. expressing the view of eight members of this Court, it stated:

> "In the present case there was not, to be sure, a complete denial of all right of cross-examination. But the petitioner was denied the right to ask the principal prosecution witness either his name or where he lived, although the witness admitted that the name he had first given was false. Yet when the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' (Pointer v. Texas, 380 U.S., at 404) through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name

and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself."

At bar, the emasculation of cross-examination went even far beyond the mere probing of the correct name and address, but extended to the very identity and existence of McMillan, and to the very essence of his intimate association with Agent Sears and his nephew Wieder, in their combined testimony against these petitioners.

This type of prejudice has never gone unnoticed by this Court. In *Alford v. United States*, 282 U.S. 687, the Court held:

"Prejudice ensues from a denial of the opportunity to place a witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them."

In *Greene v. McElroy*, 360 US 474, the Court stated:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where a governmental action seriously injures an individual and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We have formulized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which pr vides that in

all criminal cases, the accused shall enjoy the right 'to be confronted with the witnesses against him'."

In *Fahy v. Connecticut*, 374 US 85, this Court held:

"On the facts of this case, it is not now necessary for us to decide whether the erroneous admission of evidence obtained by an illegal search and seizure can ever be subject to the normal rules of 'harmless error' under the federal standard of what constitutes harmless error. Compare Ker v. California, 374 US 23, 10 L ed 2d 726, 83 S Ct 1623.

We find that the erroneous admission of this unconstitutionally obtained evidence at this petitioner's trial was prejudicial; therefore, the error was not harmless, and the conviction must be reversed. We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."

In *Flanagan v. Rose, Warden*, 478 F 2d 222 (CA 6, 1973), the Court fittingly held:

"Since the evidence secured in the search was essential to establish the appellant's connection with the crime the admission of such evidence cannot be harmless error."

Rejecting the claim of "harmless error" in situations such as at bar, the Court stated in *United States v. Portomene*, 221 F. 2d 582 (CA 5):

"We do not think that this will at all do. Who can say whether deprived of the information to which he was

entitled, the defendant in his lame and halting efforts to extricate himself from the situation in which the refusal to name the informant had placed him, did not greatly prejudice his defense by offering testimony which the jury may have thought was adduced to set up a straw man simply to knock him down. When, as here, a right, clear and unquestioned in principle and established by authority, is denied a defendant on trial for his liberty, it does not lie in the mouth of the government to say that, though the court erred by depriving the defendant of the information he sought and to which he was entitled, and thus visited a wrong upon him, the conviction should nevertheless stand because the amount and extent of the prejudice is not precisely shown. 221 F 2d 584."

Accord: *Sorrentino v. United States* (9th Cir. 1947), 163 F 2d 627; *United States v. Hanna* (6th Cir. 1965), 344 F 2d 327; *United States v. Fay*, (2d Cir. 1965), 344 F 2d 625. In *United States v. Mele*, 462 F 2d 918 (CA 2, 1972), the Court stated:

"Due process requires, however, that a different rule be applied when prosecutorial suppression has caused the evidence not to be presented at trial. At least where the suppression is deliberate, the defendants need only show that the evidence is material and could in any reasonable likelihood have led to a different result on retrial. Giglio v. United States, 405 US 150, 154, 92 S Ct 763, 31 L Ed 104 (1972). See also United States v. Keogh, 391 F 2d 138 (2 Cir. 1968); Kyle v. United States, 297 F 2d 507 (2 Cir. 1961). In these cases, where there has been a considered decision to suppress and where the value of the information 'could not have escaped the prosecutor's attention,' United States v. Keogh, supra, at 147, it is not necessary to engage in any exact determination of the degree of prejudice to the defendants."

"A fair trial in a fair tribunal is a basic requirement of due

process." (*In re Murchison*, 349 US 133, 136; *Lisenba v. California*, 314 US 219 (1941); *Buchalter v. New York*, 319 US 427, 429; *Roviaro v. United States*, 353 US 53; *United States v. Fay*, 344 F 2d 625 (2d Cir.).

The deliberate misrepresentations to the Court and defense during the pre-trial discovery proceedings, and throughout the entire suppression hearing, and at the trial, all added up to "testimony known to be perjured (*Mooney v. Holohan*, 294 US 103); material testimony wilfully withheld by the prosecution (*Alcorta v. Texas*, 355 US 28); reliance upon false testimony relating to the credibility of key Government witnesses (*Napue v. Illinois*, 360 US 264; "the suppression by the prosecution of evidence favorable to the accused" (*Brady v. Maryland*, 373 US 83; *Pyle v. Kansas*, 317 US 213; *Giglio v. United States*, 405 US 150); and unconscionable prosecutorial misconduct grossly offensive to the "canons of decency and fairness". (*Rochin v. Calif.*, 342 US 165; *Berger v. United States*, 295 US 78).

The Government had flagrantly struck the "foul" blows condemned by this Court in *Berger v. United States, supra*, at p. 88.

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

In *Roviaro v. United States*, 353 US 53, 60-61, this Court laid down the salutary rule that if the Government unjustifiably withholds the disclosure of an informer's identity, the Court may impose the prophylactic sanction of dismissing the action, consistent with fundamental requirements of fairness.

In *United States v. Jencks*, 353 US 57, this Court held:

> "The criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce . . . relevant statements or reports in its possession of Government witnesses touching the subject matter of their testimony at the trial.***
>
> Since the Government which prosecutes an accused also has the duty to see that Justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental powers to deprive the accused of anything which might be material to his defense."

The ultimate sanction of the vacatur of a sentence and the dismissal of an indictment is a severe remedy. But, as this Court recently declared in a unanimous opinion delivered by Chief Judge Burger: "*** such severe remedies are not unique in the application of constitutional standards." (*Strunk v. United States*, 93 S.Ct. 2260 (1973).

As Mr. Justice Brandeis stated in his classic dissent in *Olmstead v. United States*, 277 US 438:

> "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example***. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a

law unto himself; it invites anarchy."

B. The Denial of petitioners' motion to vacate the jury verdict and sentence by the District Court, without a hearing, and its failure on application or sua sponte, to re-consider de novo the issues raised in the suppression hearing in the light of the diametrically contradictory evidence adduced at the trial, deprived them of their constitutional right to procedural and substantive due process under the Fourth and Fifth Amendments.

In *Napue v. Illinois*, 360 U.S. 264, 271, this Court stated:

> "The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting as it does, on our solemn responsibility for maintaining the Constitution inviolate."

Accord: *Brookhart v. Janis*, 384 U.S. 1.

Where, as here, the trial testimony of the principal Government witnesses differed fundamentally from that given by them at the pre-trial suppression hearing, the trial judge was under a clear duty, *sua sponte*, to consider the search and seizure issues *de novo*. (*Rouse v. United States*, 359 F 2d 1014). The failure to do so was constitutional error.

In *Heath*, 260 F 2d 623, recently cited by the *Ellsberg* Court in dismissing the indictment for prosecutorial misconduct, the Court stated:

> "*** any unfairness to a defendant should be eliminated by the trial judge. To prevent possible prejudice on trial beyond the general atmosphere of impartiality which traditionally pervades the courtroom, trial judges have

wide discretion to methods of control. Among these are direction of mistrial, order to the jury to return verdict of acquittal and grant of new trial.***

If the trial court had not during the course of trial corrected this patent unfairness to defendant, as it inherently had the power to do upon conviction, appeal for defendant would have lain."

A search and seizure suppression hearing is an independent plenary proceeding, not merely a procedural step in the trial of a criminal case. *Jones v. United States,* 362 US 257; *Giordonello v. United States,* 357 US 480; *On Lee v. United States,* 343 US 747; *Grant v. United States,* 282 F 2d 165 (CA 2):

A warrantless arrest effected under the false colors of "exigent circumstances" and lack of pre-existing probable cause—in order to obviate the necessity of search and arrest warrants wherever practicable, as here—is *per se* an unreasonable search and seizure violative of the letter and spirit of the Fourth Amendment. Such an arrest cannot logically pass the muster of reasonableness.

A claim of illegal arrest and consequent unlawful search and seizure could be properly raised in a post-conviction proceeding to vacate the sentence. (*Kaufman v. United States,* 394 US 219 (1969); *Duhart v. United States,* 476 F 2d 597). Here, the petitioners' motion to vacate the sentence and to dismiss the indictment was grounded not alone on the unlawful arrest and illegal seizure of evidence, but on the wilful fraud committed upon the Court and the petitioners in suppressing vital evidence (*Brady v. Maryland,* 373 US 83).

In its formal memorandum decision adverse to petitioners' contentions of prosecutorial misconduct, the District Court inadvertenetly misstated that a "hearing" had been held on July 31, 1973, at which time argument was heard and "testimony was taken from Assistant United States Attorney Del Grosso". (A-4, A-5, A-6).

The fact is, however, that petitioners were accorded no opportunity of a "hearing" whatsoever to re-affirm the allegations of prosecutorial misconduct contained in the record of the trial and the suppression hearing, within the due process standards of the Fifth Amendment, or the guidelines laid down in *Pate v. Robinson,* 383 US 375. Nor was any sworn "testimony" whatever taken from Mr. Del Grosso, or anyone else, to justify the Court's patently erroneous conclusion that Petitioners' claims were "frivolous."

C. In the absence of exigent circumstances, a warrantless street-auto arrest is inherently violative of the Fourth Amendment especially where, as here, the street arrest at the fixed location had been pre-arranged and planned by government agents, with sufficient time to apply for an arrest warrant and search warrant.

In its specific holding that warrantless street arrests are valid, even in the absence of exigent circumstances, the Court of Appeals has decided a federal question in direct conflict with the applicable decisions of this Court, of other Courts of Appeal, and even in conflict with its own prior precedent decision in an identically parallel street arrest under non-exigent circumstances (*Coplon v. United States,* 185 F.2d 629, 635-6 (CA 2, 1950, opinion by Ch. Judge Learned Hand; *Carroll v. United States,* 267 US 132; *Coolidge v. New Hampshire,* 403 US 443, 455, 478;

United States v. Di Re, 332 US 581; *Henry v. United States*, 361 US 98; *Gatlin v. United States*, 326 F.2d 666 (App. D.C.); *Ford v. U.S.*, 352 F. 2d 927 (App. D.C.); *Cohen v. Norris*, 300 F.2d 24, 31 (CA 9, 1962); *United States v. Rabb*, 141 F.2d 45 (CA 3, 1944); *Worthington v. U.S.*, 166 F.2d 557, 562 (CA 6, 1948); *Niro v. United States*, 388 F.2d 535 (CA 1, 1968); *Clay v. United States*, 239 F.2d 196 (CA 5, 1956).

To hold that a "street arrest", in and of itself, is sufficient to justify the dispensibility of a warrant, even if it had time to procure a warrant, would be to flout the constitutional command, enunciated by this Court time and again, that "the Fourth Amendment has interposed a magistrate between the citizen and the police" (*McDonald v. United States*, 335 US 451, 454-5).

In *Jones v. United States*, 362 US 257, 271-2, this Court stated:

> "In a doubtful case, when the officer does not have clearly convincing evidence of the immediate need to search, it is most important that resort be had to a warrant, so that the evidence in the possession of the police may be weighed by an independent judicial officer, whose decision, not the police, may govern whether liberty or privacy is to be invaded."

In *Coolidge, supra*, the Court stated:

> "*** (T)he most basic constitutional rule in (the search and seizure) area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' The exceptions are

'zealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.' '(T)he burden is on those seeking the exemption to show the need for it.' ***"

The protective shield of magisterial interposition is as rationally applicable to arrests no less than searches—indeed, even far more so, for the former involves the fundamental protection of the person against illegal arrest, as compared to a mere transient search for property.

In *Niro v. United States,* 388 F.2d 535 (CA 1, 1968) in diametric conflict with the holding at bar by the Second Circuit Court of Appeals, where the officers had probable cause to arrest over 12 hours before making the warrantless arrest similarly involving contraband in a vehicle, the Court stated:

"If no penalty were ever attached to a failure to seek a warrant, as distinguished from the officers making their own correct determination of probable cause, warrants will never be sought, at least when the search is expected to be accompanied by an arrest. We think it proper to say that while the failure to obtain a warrant when one could readily have been had is not a necessity fatal to a search or seizure concomitant with an arrest the nature of which had been fully anticipated, it will be fatal unless there are at least some countervailing factors. We need not define such circumstances. In the case at bar we find none. We hold that the government cannot rely upon an expected arrest to seize stolen goods, the presence of which it long had probable cause to know of, simply to avoid the inconvenience of obtaining a search warrant."

(Cited in *Constitutional Rights of the Accused,* Prof. Joseph G. Cook, Sec. 15, Lawyers Coop. Publ. Co., 1972).

A warrantless arrest or search is presumptively illegal. (*Coolidge v. New Hampshire,* 403 U.S. 443; *Vale v. Louisiana,* 399 U.S. 30; *Coplon v. United States,* 185 F. 2d 629 (CA 2, 1950).

The constitutional strictures are as applicable to automobile searches, as to all others. (*Carroll v. United States,* 267 US 132; *United States v. Valen,* 479 F 2d 467, 470 (CA 3, 1973).

In *Coolidge, supra,* at p. 461, Mr. Justice Stewart wrote:

> "The word 'automoble' is not a talisman in whose presence the Fourth Amendment fades away and disappears***. In short, by no possible stretch of the legal imagination can this be made into a case where 'it is not practicable to secure a warrant', Carroll, supra, at 153, 69 L Ed at 551, 39 ALR 790, and the 'automobile exception,' despite its label, is simply irrelevant."

Identically parallel to the warrantless street arrest at bar is *Coplon v. United States, supra,* at pp. 635-6 (CA 2, 1950), wherein Chief Judge Learned Hand, speaking for a unanimous Court, stated:

> "***There was not the slightest need of arresting her without a warrant, even if there had been danger that she might run away and hide. It is apparent that even in the morning the Bureau had decided to arrest her that day; and there was not the least need of doing so without a warrant. No sudden emergency forced the hand of the agents; *they made everything ready except the one condition which would have made the arrest lawful: a warrant.*
>
> ***We have no alternative but to hold that the arrest was

invalid, and concededly that made the packet incompetent against her." (Underscoring supplied)

Accord: *United States v. Gamble*, 473 F 2d 1274 (CA 7, 1973)

In *Wong Sun v. United States*, 371 US 471, 479, this Court stated:

"The history of the use, and not infrequent abuse, of the power to arrest cautions that a relaxation of the fundamental requirements of probable cause would 'leave law-abiding citizens at the mercy of the officers' whim or caprice'. Brinegar v. United States, 338 US 160, 176, 93 L Ed 1879, 1890, 69 S Ct 1302."

And, at pp. 481-2:

"The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause."

D. Testing the legality of Petitioner Mascolo's arrest solely by the prosecution's own false standard of proof elicited at the suppression hearing, the conceded lack of probable cause rendered the arrest unlawful and the seizure of evidence inadmissible, under the Fourth Amendment.

Even on the Government's own contrived theory at the suppression hearing, the warrantless arrest of petitioner Mascolo and the seizure of evidence incident thereto, were plainly violative of the Fourth Amendment.

In the attempt to justify the warrantless arrest of Mascolo at

the suppression hearing, under the guise of exigent circumstances, *the prosecutor maintained and conceded that Wieder was not a reliable informant,* and that it had no other corroberative information (129-132). In its stead, the Government relied solely upon the agents' observations at the time of the arrest to supply the requisite probable cause.

Comporting to that theory of the prosecution, the District Court explicitly held that "although Mascolo's arrest on October 25, 1972 was without a warrant, it was nevertheless lawful because probable cause for the arrest did not emerge until the happening of the events on that day." (A-6)

Nonetheless, the Government's case was still flawed with an illegal arrest and a seizure.

The record of the suppression hearing discloses that the only observation upon which the Agents relied to predicate Mascolo's arrest was not based on any independent incriminating conduct on his part, or on any other objective factor, but solely and exclusively on a pre-arranged signal *from Wieder alone* indicating that Petitioner Mascolo had allegedly brought the contraband into Wieder's car. It was on the basis of that signal alone and naught else that the Agents immediately surrounded the car with guns drawn and arrested him (885-6, 1183, 1208).

The mere signal from Wieder was legally insufficient to spell out probable cause for the arrest. If, in the Government's concession, Wieder was unreliable as an informant, then *ipso facto,* he was no less unreliable in purportedly signalling the agents upon which to structure Mascolo's arrest on October 25, 1972.

Accordingly, the denial of the motion to suppress was constitutional error.

E. The primary illegality of Wieder's arrest on September 28, 1972 tainted any evidence derived therefrom as "the fruit of the poisoned tree".

Had the Government fairly presented to the Court, at the suppression hearing, the critical facts which were later elicited at the trial regarding McMillan—conclusively establishing the absence of exigent circumstances and the necessity for arrest warrant and search warrant for Wieder's home, person and car based upon probable cause—the warrantless arrest would have been necessitously declared violative of the Fourth Amendment.

In a disingenuous effort to circumvent the illegality of that arrest, the prosecutor maintained that that arrest did not hinge on any search or seizure, but simply and solely on the pick-up of an abandoned package of contraband thrown by Wieder from his car, during a chase to avoid an arrest.

Here, too, even testing the legality of Wieder's arrest by the Government's own spurious standard of proof, the arrest was plainly violative of the Fourth Amendment.

The fact is that the "arrest" of Wieder had been effected, within the constitutional perspective of the Fourth Amendment, at the moment the agents had initially surrounded his car for the purpose of arresting him—prior to the pick-up of the contraband thrown from his car. (*Henry v. United States*, 361 US 98; *Rios v. United States*, 364 US 253).

In *Henry*, as precisely at bar:

"When the Officers interrupted the two men and their liberty of movement, the arrest for purposes of this case, was complete."

In *Rios*, the Court stated:

"If, therefore, the arrest occurred when the officers took their positions at the doors of the taxicab, then nothing that happened thereafter could make that arrest lawful, or justify a search as its incident (cases cited). *** The validity of the search thus turns upon the narrow question of when the arrest occurred***".

Accordingly, the primary illegality of Wieder's arrest fatally tainted all evidence obtained thereby as the "fruit of the poisonous tree" (*Wong Sun v. United States*, 371 US 471; *Silverthorne Lumber Co. v. United States*, 251 US 385; *United States v. Edmons*, 432 F 2d 577 (CA 2, 1970).

His subsequent telephone conversation with Petitioner Epifania on October 25, 1972, and the arrest of Petitioner Mascolo and the seizure of evidence incident thereto, were inextricably entwined with the primary taint of that unlawful arrest. This evidence, having been come at by direct exploitation of that illegality in completely unattenuated form, should have been suppressed. (*Nardone v. United States*, 308 US 341; *Wong Sun v. United States, supra*, at p. 487; *Costello v. United States*, 365 US 265).

Evidence that is the product of an illegal search is "subject to the proscriptions of the Fourth and Fourteenth Amendments" and must be excluded (*Davis v. Mississippi*, 394 US 721; *Henry v. United States*, 361 US 98; *Beck v. Ohio*, 379 US 89; *Rios v. United States*, 364 US 253).

The Petitioners had legal standing to contest the legality of Wieder's arrest, for the evidence conclusively showed that they were among the specific targets of that arrest. *Jones v. United States*, 362 US 257; *United States v. Mapp*, 476 F 2d 67 (CA 2, 1973); *United States v. Cobb*, 432 F 2d 716; *United States v. Bozza*, 365 F 2d 206; *United States v. Maryland*, 479 F 2d 566).

The undeniable fact is that Wieder was arrested on the direct information given to the Government by McMillan, who had likewise targeted the Petitioners as the alleged suppliers of the contraband seized from Wieder.

In *Mapp, supra*, the Court below definitively stated, at p. 71:

"There is language in Jones v. United States, 362 US 257, 80 S Ct 725, 4 L Ed 2d 697 (1960) which at least suggests that the 'target' of a search is a 'person aggrieved,' Rule 41(e), F.R.Cr.P., and therefore has standing to challenge the constitutionality of that search. In *Jones*, Justice Frankfurter, writing for the Court, said:

> In order to qualify as a 'person aggrieved by unlawful search and seizure' one must have been a victim of a search or seizure, *one against whom the search was directed*, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.

362 US at 261, 80 S CT at 731 (emphasis supplied). The passage was cited approvingly in Alderman v. United States, 394 US 165, 173, 89 S Ct 961, 22 L Ed 2d 176 (1969); *see also*, 18 U.S.C. Sec. 2510 (11), defining a 'person aggrieved' by an unauthorized wiretap as 'a person who was a party to any intercepted wire oral

communication or a person against whom the interception was directed.' "

F. The prejudicial introduction into evidence, in the main case of the prosecution, of an alleged prior narcotic sale long antedating the conspiracy charged in the indictment, especially where proof of guilt had not been otherwise established beyond a reasonable doubt, violated the due process rights of both petitioners under the Fifth Amendment.

In a case so laden with reasonable doubt as the one at bar, the prejudicial impact upon the jury of the alleged March 1971 transaction between McMillan and petitioner Epifania, introduced in the direct case of the Government before the defendants had taken the stand, was constitutional error. Here, as in *United States v. Byrd*, 352 F 2d 570, 575 (CA 2, 1965), there was "no pressing necessity that evidence of that prior occasion be offered on the Government's main case. *United States v. Ross*, 321 F 2d 61, 67 (2d Cir. 1963)."

The denial of a mistrial on this vital issue as to petitioner Mascolo, likewise, was constitutional error, despite the Court's instruction to the jury that the prior transaction was to be considered only as to petitioner Epifania (1331, 1415).

This evidence was prejudicially highlighted still further in the Court's charge to the jury (1878-9). Though the trial Court did charge that that testimony had no binding effect on Mascolo (272, 917, 1339), such instruction to the jury could not realistically purge the jurors' minds of its overriding prejudicial impact.

As Mr. Justice Jackson noted in his concurring opinion in *Krulewitch v. United States*, 336 US 440, 445:

"The naive assumption that prejudicial effects can be overcome by instructions to the jury *** all practicing lawyers know to be unmitigated fiction."

And, as stated in ***Bruton v. United States***, 391 US 123, regarding a jury instruction that a co-defendant's implicating confession had to be disregarded in determining the guilt or innocence of a defendant on trial:

> "***there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."

G. The inherent incredibility of the principal Government witnesses created a reasonable doubt as a matter of law.

The conclusively demonstrated lack of veracity and unreliability of Special Agent Sears *vis a vis* McMillan, and the patent untruthfulness of Wieder's testimony regarding the putative code word "shirts" in his telephone conversation with petitioner Epifania on October 25, 1972, created a reasonable doubt as a matter of law. The inherent incredibility of these principal witnesses could not validly support the judgment of conviction under the standards of due process (*In re Winship*, 397 U.S. 358).

The only independent evidence linking petitioner Epifania to the conspiracy charged against him was the recorded telephone conversation he had with Wieder on October 25, 1972, in which the latter used the word "shirts" as the allegedly agreed upon code word for heroin. Yet, Wieder's veracity on this score was completely demolished by the proven facts establishing the very contrary.

It is important to note that this palpably false testimony was given on re-direct examination—after the prosecutor had sought

permission to confer with Wieder during the week-end recess, and had done so—following his direct examination on the subject matter of this telephone call (630).

The controlling facts are that it was Wieder who used the word "shirts" in that telephone conversation, not petitioner Epifania; that Wieder himself had testified, on direct examination, that he had never used the word "shirts" in any prior conversation with Epifania (428); that on his own direct examination, Wieder had testified that in his prior phone call to Epifania earlier on September 28, 1972, he used the word "things", and not "shirts" (219-220); that when he was originally interviewed by Agent Sears on October 26th, only one day after that alleged telephone conversation, Wieder had told the Agent that he had always used the code words "goods or things" for heroin (not "shirts") in his conversations with Epifania (654); and finally that he had categorically testified in the Grand Jury on October 30th, 1972—only five days after that alleged phone conversation, that he had used the word "things" to denote heroin in that telephone conversation of October 25th with Epifania, and not "shirts" (664-666).

The informant McMillan, likewise, testified that he used the word "things" (not shirts) in his alleged conversations with Epifania (140).

Thus, as a matter of law, the internal inconsistencies in Wieder's own testimony on this vital issue destroyed the single area of independent proof against petitioner Epifania.

Both Wieder and McMillan, uncle and nephew, were under extraordinary pressures of self-interest and self-preservation to testify falsely against the petitioners. What Agent Sears

primarily demanded of them as the price of leniency was any information as to Epifania, and none else (517-518, 523).

Each of them had heavy criminal sentences facing them in connection with their own arrests for federal narcotic violations. Wieder, in addition, had at stake an extra five year probationary sentence at the time of his arrest.

The record shows that both Wieder and McMillan had been dealing in narcotics with other suppliers, long prior to their alleged involvement with these petitioners (364).

In return for his testimony against the petitioners, Wieder did in fact receive but a suspended sentence on his plea of guilty in connection with his narcotic arrest of September 28, 1972.

In addition to the motivations of self-interest infecting his credibility, Wieder's unsavory criminal background cast grave doubt on his veracity as a witness. In 1961, he received a 5 year sentence for possession of heroin (239-250). In 1971, he had received a 5-year probationary sentence for possession of stolen property, and while on probation, was again wheeling and dealing in narcotics, resulting in his re-arrest on the federal narcotics charge on September 28, 1972 (240-1).

McMillan's motivations of self-interest, likewise, to testify falsely against the petitioners rendered his credibility totally suspect as a government witness. The measure of his cooperation with Special Agent Sears depended essentially upon any information he could wring from McMillan regarding the petitioner Epifania. He informed on his own nephew Wieder, leading to his arrest, and he had an exceptionally sordid criminal background.

In April 1964, while serving a sentence for Robbery, he had been committed to Matteawan for the Criminally Insane by Court order and remained there for 17 months. Following his return from Matteawan in the summer of 1965, he returned to Court and commenced a sentence of one year's parole (1353-7).

He had been a narcotic addict "a long period of time ago *** the early part of the fifties". He had "shot it up" in both arms. (1386).

He had been arrested on a Burglary charge in 1959, pleaded guilty to Attempted Grand Larceny, and sentenced to five years in the Elmira Reformatory, and served 21 months on that sentence (1353, 1358). He had also been convicted of Robbery in 1963, serving 38 months (1340).

In 1971 he had pleaded guilty to a narcotics charge of possession of a half kilo of heroin in the Queens County Supreme Court, for which he received a suspended sentence. In that case, he had cooperated with the Queens authorities and the Special Task Force on Narcotics (1341, 1360-1361).

In marked contrast, each of the petitioners took the stand in their own defense. Neither of them had a prior criminal record. Each of them categorically denied that they had ever engaged in any illicit narcotic transactions whatsoever with either Wieder or McMillan. Petitioner Mascolo emphatically denied that he had had any narcotic drugs in his possession at the time he entered Wieder's car on October 25, 1972. Confirming his testimony that his meeting with Wieder on that day was for the specific purpose of paying him $1000 that he owed him for an unrelated debt, the petitioner Mascolo did, in fact, have upon his person at the time of his arrest the exact sum of $1,000 in one pocket with which to pay Wieder (1753).

In this unpalatable background of the government's case, it is significant that the taint of incredibility persistently hovered over the jury's deliberations — graphically illustrated by the jurors' inquiry of the Court at the very outset of deliberations — indicating a gnawing doubt as to Epifania's guilt. "Are we allowed to inquire of the following: are there any other males in Epifania's family with the same name Louie Epifania, for instance, his father?" (1918).

Significantly, too, the jury verdict was beclouded by the extraordinary circumstance that one of the jurors, by dictate of conscience, had phoned the trial judge the very next morning after the verdict and informed the Court that he "couldn't sleep last night', that he "did an injustice" to these petitioners in finding them guilty (1945), and he now felt that the jury didn't have "sufficient time" to deliberate (1949). In open Court, the juror stated that though he had been polled after the verdict, he now felt: "I'm wrong". (1949-1950) "I figured in my opinion there wasn't sufficient time to kick this around" (1951); and further he stated, that after the jury returned to the jury room at 6:20 P.M. to deliberate, and then filed back to the courtroom within 25 minutes thereafter with the verdict: "Yes, to me it was still insufficient time. In my opinion, it still didn't cover everything. Everybody is looking at watches; everybody is in a hurry to go home; that is what I'm trying to say." (1952)

H. Title 18 United States Code Section 2511, authorizing the interception of a communication where "one of the parties" has given prior consent to such interception is unconstitutionally derogative of the Fourth and Fifth Amendments.

Title 18 United States Code Sec. 2511(2)(c), enacted by Pub. L. 90-351, Title III, Sec. 802, eff. June 19, 1968, 82 Stat. 213 provides:

"It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or one of the parties to the communication has given prior consent to such communication."

We respectfully submit that the authorization to intercept a wire or oral communication, merely on the consent of "one of the parties", is an unconstitutional invasion of the right of privacy to which all parties to a telephone conversation are entitled under the Fourth Amendment of the Constitution.

Further, to hold that the right of privacy to a telephone conversation can be taken away at will, merely by the secret consent of one of the parties to the conversation, is, likewise, a denial of the equal protection of the laws to which all are entitled under the Due Process Clause of the Fifth Amendment of the Constitution.

In *Katz v. United States*, 389 U.S. 347, this Court held unlawful, without antecedent judicial authorization of a search warrant under the Fourth Amendment, the introduction of evidence of the telephone conversation of a suspect transmitting wagering information by wire, which conversations were overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he placed his calls. Said the Court at p. 359:

> "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."

In *United States v. Polakoff*, 112 F.2d 888, 889 (CA 2) 940,

cert den. 311 US 653), Judge Learned Hand, presciently anticipating this Court's decision in *Katz, supra,* wrote:

> "Every telephone talk, like any other talk, is antiphonal; each party is alternately sender and receiver and *it would deny all significance to the privilege created by Sec. 605 to hold that because one party originated the call he had power to surrender the other's privilege.* There cannot be the least doubt of this as to the answers of the party called up; and while it might indeed be pedantically argued that each party had the power to consent to the interception of at least so much as he said, that would be extremely unreal, for in the interchange each answer may, and often does, imply by reference some part of that to which it responds. It is impossible satisfactorily so to dissect a conversation, and the privilege is mutual; *both must consent to the interception of any part of the talk.* ***" (Emphasis ours).*

Accord: *United States v. Fallon,* 112 F.2d 894 (CA 2, 1940).

In *Polikoff, supra,* the judicial fear of unlawful telephonic interception by Government agents was expressly explicated by Judge Hand, as follows:

> "*** no matter what the scope of any such implied consent, it cannot extend to the intervention of prosecuting agents bent upon trapping the 'sender' criminally. Violation of the privilege, we are admonished, is so grave a dereliction as to be 'destructive of personal liberty' *Nardone v. United States,* 302 US 379, 383, 58

*It will be noted that Sec. 605 of the Federal Communication Act (47 US Code Sec. 605), forbidding any person *"not being authorized by the sender"* from intercepting a telephone conversation, is substantially identical to *Title 18 US Code Sec. 2511,* requiring the consent of one of the parties to the conversation.

S.Ct. 275, 277, 82 L.ed 314) and if it is not to be sham and illusion, it must protect its possessor at least against such intrusion."

To the contrary of the views espoused by this Court in *United States v. Katz, supra,* is *United States v. Riccobene,* 320 F 196, affd. 451 F 2d 586; *United States v. Avila,* 443 F 2d 792 (CA 5, 1971), cert. den. 404 US 944, 92 S Ct 295, 30 L Ed 2d 258; *United States v. Castillo,* 449 *F* 2d 1300 (CA 5 1971); *United States v. Butler,* 472 F. 2d 1 (CA 2); *United States v. Fanning,* 477 F 2d 47 (CA 5, 1973), citing *United States v. White,* 401 US 745, rehearing den. 402 US 990).

However, this Court's decision in *United States v. White, supra,* is not at all to the contrary. The majority view, in essence, definitively held in separate opinions, concurring and dissenting alike, that police eavesdropping on conversations, without a search warrant, between an accused and an informant by means of a radio transmitter concealed on the informant's person, is violative of the Fourth Amendment. (*Black, Brennan, Harlan, Douglas, Marshall,* JJ.)

A bare majority of five members of the Court, although not agreeing on an opinion, held only that *Katz v. United States, supra,* had been improperly given retroactive effect.

Thus, the principle of privacy enunciated by this Court in *Katz* remains a controlling constitutional ruling at bar.

A construction that would permit the interception of any communication by telephone attachment or electronic device upon the one-sided consent of a single party thereto—without judicial sanction of a warrant—would empower any party to

undermine at will the privacy of all others.

The mere consent of one party alone would enable a venal wrongdoer to spy on one's neighbor by easy interception of every telephone conversation. It would intrude uninvited third parties into supposed confidential relationships of every kind, in the private business world as well as in official circles of government, without any judicial controls whatsoever against the invasion of privacy of all those directly affected. It would maximize the Orwellian threat of massive police interceptions against the citizenry in general, under color of official authority—whether for law enforcement purposes or not, and with or without probable cause—substituting the mere consent of an alleged accomplice, or co-conspirator or would-be complainant of any sort, feigned or otherwise, to justify the wiretap, instead of the objective evaluation of a neutral Magistrate.

The judicial restraint of a court order or search warrant to protect the right of privacy, urged here, would not obstruct or hamper law enforcement in any manner, for where probable cause is shown, an order for interception will be readily available, precisely as in the case of search warrants governing the seizure of physical evidence. Contrarily, in those special cases where the practicabilities for obtaining a court order are lacking under exigent circumstances, a court order can be readily dispensed with, under the fixed judicial precedents governing a reasonable search and seizure under the Fourth Amendment.

At bar, only a listening search warrant could have validated the intercepted telephone conversation between petitioner Epifania and Wieder on October 25, 1972. There was no pressure of time or exigent circumstances whatsoever.

The proof conclusively established that this was the *tenth* in a eries of pre-arranged transactions, invariably preceded by elephone conversations with petitioner Epifania. Undeniably, he government agents had more than ample time within which o have applied for a warrant, for they had been sufficiently alerted the preceding day. The agents, in fact, had used the very intercepted call to postpone the meeting for a later hour to serve their convenience, and for aught that appears, could have postponed the meeting for any other extension of time deemed necessary to accommodate the practicabilities of obtaining the necessary warrant. A Magistrate was readily available for such purpose.

Accordingly, the evidence against petitioner Epifania was constitutionally inadmissible under the Fourth and Fifth Amendments. The evidence against petitioner Mascolo was likewise inadmissible as the fruit of the poisoned tree. (*Wong Sun v. United States,* 371 US 471; *Davis v. Mississippi,* 394 US 721; *Nardone v. United States,* 302 U.S. 379).

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED, AS TO EACH PETITIONER, IN THE INTERESTS OF JUSTICE.

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Respectfully submitted,

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